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Supreme Court of the United States

October Term, 1897.

No. [redacted] 59

A. LEO WEIL and CHARLES M. THORP, doing business under the firm name and style of Weil & Thorp,

Petitioners,

against

EDWARD M. NEARY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

LOUIS MARSHALL,
Respondent's Counsel.

The Stock Press, 27 Warren St., N. Y. 'Phone, Warren 1418.

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Supreme Court of the United States

OCTOBER TERM, 1927.

A. LEO WEIL and CHARLES M. THORP, doing business under the firm name and style of Weil & Thorp, Petitioners, against EDWARD M. NEARY, Respondent.	No. 736.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

The petitioners have applied for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit for the review of a judgment of that Court affirming a judgment in favor of the respondent against the petitioners rendered by the United States District Court for the Southern District of New York for $80,991.08 upon the confirmation of the report of Allen Wardwell, Esq., as Referee to hear, try and determine the issues (*Rec., pp.* 215-219, 271).

The opinion of the Circuit Court of Appeals is reported 22 Fed. (2nd) 893.

The petitioner has submitted a voluminous document styled "Appendix" which apparently is merely a copy of the "Transcript of Record."

The trial was a protracted one, the testimony and exhibits covering nearly 2,200 printed pages. No bill of exceptions was allowed, signed or filed.

We contend that, there having been no written waiver of a jury as provided by Sections 649 and 700 of the Revised Statutes, the Referee was an arbitrator whose determination is not reviewable.

At all events, if there is anything to be reviewed, the review will be limited to the consideration of the proposition as to whether the findings contained in the report of the Referee justified the conclusions of law awarding judgment.

Chicago, M. & St. P. Ry. Co. v. Clark, 92 Fed. Rep. 968.

Shipman v. Streatorville Central Mining Co., 178 U. S. 356, 361.

Dooley v. Pease, 180 U. S. 126, 131.

David Lupton's Sons v. Automobile Club, 225 U. S. 489, 494.

Rossler & Haarlacher Chemical Co. v. Standard Silk Dyeing Co., 254 Fed. Rep. 777.

United States v. One Diamond Necklace, 267 Fed. Rep. 696.

Anastasatos v. All Russian etc. Societies, 270 Fed. Rep. 460.

The petition does not set forth the findings of the Referee, but consists of a statement largely garbled. *It totally ignores the Referee's findings, which are controlling.* We are, therefore, constrained to refer to the incontrovertible findings of fact contained in the Referee's report (*Rec., pp.* 165-172) on which is based his conclusion of law

that the defendants (petitioners) are jointly and severally indebted to the plaintiff in the sum of $57,061, with interest from November 15, 1920, and direction for judgment accordingly (*Rec., p.* 172).

The Referee's Findings of Fact.

After showing that the defendants were lawyers engaged in practice at Pittsburgh, Pa., and that Mr. Samuel Untermyer, the plaintiff's (respondent's) assignor, was engaged in the practice of the law in New York City, and that before the commencement of this action he had assigned and transferred to the plaintiff all of his right, title and interest in and to the cause of action set forth in the complaint and amended complaint herein, and that the plaintiff is the owner thereof (*Rec., fols.* 7209, 7210), the Referee found as facts:

> "4. Prior to the month of August, 1917, and in or about 1915, plaintiff's assignor was retained as attorney and counsel for a large number of creditors of one Josiah V. Thompson, who resided at Uniontown, Pa., where he was engaged in the business of a banker and in the operation of coal mines, to enable the said creditors to collect from the said Thompson and out of his property his indebtedness to them, which amounted to many millions of dollars. *The affairs of the said Thompson were greatly involved, and it was agreed in the interests of his creditors that the extensive properties of the said Thompson should be conserved so that they might be applied equitably to the payment of the claims of his creditors*" (*Rec., fols.* 7210, 7211).
>
> "5. On or about January, 1915, such proceedings were had that receivers of the estate of said Thompson were appointed by the Court of Common Pleas of Fayette County, Pennsylvania, and during the pendency of such receivership said es-

tate was protected from being disrupted by the action of hostile lienors who sought to dispose of its assets under circumstances which would have resulted in a sacrifice of the interests of the creditors of said Thompson, and *such assets were conserved principally through the instrumentality of plaintiff's assignor, who represented from 90% to 95% of the creditors of said Thompson, whose claims aggregated approximately $15,000,000.00*" (Rec., fols. 7211, 7212).

"6. The receivership aforesaid having been set aside by virtue of a decision of the Supreme Court of Pennsylvania on May 7th, 1917, plaintiff's assignor acting under instructions of the creditors by whom he had been retained and for the benefit of all of the creditors of the said bankrupt being satisfied *that the general creditors of the said Thompson could only be protected from the disruption, disintegration and sacrifice of the estate of said Thompson which would have resulted from forced sales on the foreclosure of mortgages and other liens and similar sales under execution upon judgments recovered against said bankrupt by the action of a court in bankruptcy, determined to reinstate such bankruptcy proceedings.* To that end he explained to defendants the facts relating to said estate and informed them of his plans looking to the *protection of the creditors and the conservation of the estate of said Thompson* and retained them to conduct such bankruptcy proceedings under his supervision upon a mutual understanding and agreement with the defendants that they were to be allowed and were to accept in full payment for their services in connection with such proceedings the sum of Five thousand ($5,000) Dollars" (Rec., fols. 7212-7213).

"7. *Prior to said retainer of the defendants by plaintiff's assignor, the defendants had had no interest in, or connection with said Thompson, his Estate or his creditors*" (Rec., fol. 7215).

"8. Upon the understanding and agreement aforesaid, bankruptcy proceedings were duly instituted on the petition of three of the creditors of the said Thompson in the District Court for the Western District of Pennsylvania for his adjudication as a bankrupt, and thereupon such proceedings were had, that on or about September 10, 1917, the said Thompson was adjudicated a bankrupt and trustees of his estate were duly appointed and the said Estate was thereupon administered in such bankruptcy proceedings, *the defendants herein acting at the instance of plaintiff's assignor and for the creditors represented by him whose interests were identical with those of the general creditors of the said Thompson*" (*Rec., fols.* 7215, 7216).

"9. *The affairs of the Thompson Estate were very complicated and the plaintiff's assignor was the person most conversant with them from the legal aspect. The trustees in bankruptcy in selecting the defendants as their counsel realized that they were selecting for that position counsel of the committee of creditors, who were represented by plaintiff's assignor and knew of defendant's connection with plaintiff's assignor in relation to such creditors*" (*Rec., fol.* 7217).

"10. In the course of the administration of the Estate of the said Thompson, various complications arose which prolonged the period of the administration of the Estate beyond that contemplated at the time of the institution of the said bankruptcy proceedings and which rendered it necessary for the defendants *and plaintiff's assignor and of the firm of Guggenheimer, Untermyer & Marshall, who acted for the plaintiff's assignor, together to perform services, which in extent and laboriousness exceeded those which it was originally believed it would be necessary for the defendants to perform in the course of the administration of the said estate in bankruptcy*" (*Rec., fol.* 7218).

"11. *Recognizing that fact, plaintiff's assignor and the defendants thereupon agreed that they should together perform such services and that the compensation of the defendants for services in such bankruptcy proceedings was not to be limited to the sum of Five thousand ($5,000) Dollars as theretofore stipulated, and in lieu of the compensation originally stipulated, it was mutually agreed that plaintiff's assignor and defendants should collaborate in rendering such services as were necessary and proper in such bankruptcy proceedings for the conservation of the estate and the protection of the creditors of the bankrupt and that the defendants were to receive for the services so to be rendered by them in the bankruptcy proceedings, out of such allowances as should eventually be made by the court in payment therefor, such sum as plaintiff's assignor should consider just and equitable, the remainder of the amount so allowed to be paid to him.*" (Rec., fols. 7219, 7220).

"12. *The said agreement referred to in Finding 11 applied only to fees for services rendered in connection with the preservation of the bankrupt's estate against forced sales by mortgagees, judgment creditors and other lienors and the sale of the properties of the estate and did not apply to fees for services rendered in connection with the general administration of the estate after all of the properties embraced in the estate had been sold or otherwise disposed of.*" (Rec., fols. 7221).

"13. Pursuant to said agreement, the defendants continued to render services in the aforesaid bankruptcy proceedings *under the general supervision and with the active aid, assistance and collaboration of the plaintiff's assignor, and of Guggenheimer, Untermyer & Marshall, who acted for him, which resulted in the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor, by the trustees in bankruptcy upon the sale thereof, for which allowances were made in such bankruptcy proceedings by the*

District Court of the United States for the Western District of Pennsylvania to the defendants at various times, between September 3, 1918, and October 27, 1920, *to an aggregate amount received by them for such services of $124,659.98, a substantial part of the services for which said allowances were made having been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall acting for him*" (*Rec., fols.* 7221-7223).

"14. *On being informed of the payments received by the defendants in said bankruptcy proceedings prior to October 28th, 1920, the plaintiff's assignor on or about November 17, 1920, pursuant to the aforesaid agreement determined the division of the sum of $124,659.98, theretofore received by the defendants as aforesaid, was that the defendant should retain 60% of the said sum received by them and that the remaining 40% should be paid to him, and the defendants were duly notified of such determination and decision*" (*Rec., fol.* 7223).

"15. Thereafter the defendants refused to comply with his determination and although he demanded that they pay over to him 40% of the sum so received by them, they refused to pay him such sum or any part thereof, and they are now indebted to the plaintiff therefor in the sum of $57,064.00 with interest from November 15, 1920" (*Rec., fol.* 7224).

The petition quotes various disconnected passages contained in the Referee's opinion. In *Fleischmann Co. v. United States*, 270 U. S. 349, 355, following other cases, this Court said:

> "In passing on this question we are confined to the findings properly so called and may not look at the referee's opinion or the court's."

See also:

Insurance Co. v. Tweed, 7 Wall. 44, 51.

Dickinson v. Planters Bank, 16 Wall. 250, 257.

British Mining Co. v. Baker Mining Co., 139 U. S. 222.

Bunker Hill & L. Mfg Co. v. Polak, 7 Fed. (2nd) 583, 584;

Isaacs v. De Hon, 11 Fed. (2nd) 943, 944.

Swanson v. Continental Casualty Co., 12 Fed. (2nd) 410.

Thompson-Starrett Co. v. La Belle Iron Works, 17 Fed. (2nd) 536, certiorari denied by this Court, 274 U. S. 748.

POINTS.

I.

The stipulation and order on which the reference herein was based, made the Referee an arbitrator, whose determination is not reviewable.

This cause was tried before Allen Wardwell, Esq., as Referee, under an order

> "that the trial of the action was referred to Allen Wardwell, Esq., as Referee, to hear, try and determine the same with all the powers to act and rule upon the said trial possessed by the Court" (*Rec.*, p. 77).

The stipulation on which the order was based, and which was recited in the order, provided

> "It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto

> that the trial of this cause be and the same hereby is referred to Allen Wardwell, Esq., as Referee, to hear, try and determine the same, with all the powers to act and rule upon said trial possessed by the Court" (*Rec., p.* 78).

It thus clearly appears that the stipulation contains no waiver of a jury as provided by Section 649 of the Revised Statutes. This, we contend, made the trial before the Referee an arbitration.

Section 649 provides:

> "Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, *whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury.* The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

This section is derived from the Act of March 3, 1865, Chapter 86.

Section 700 reads:

> "When an issue of fact in any civil cause in the circuit court is tried and determined by the court without the intervention of a jury according to section 649, *the rulings of the court in the progress of the trial of the cause, and if excepted to at the time and duly presented by a bill of exceptions*, may be reviewed by the supreme court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

This section is likewise derived from the Act of March 3, 1865, Chapter 86.

Trials without a jury in actions at law in the District Court are now controlled by the provisions of Sections 649 and 700 of the United States Revised Statutes, formerly applicable solely to the Circuit Courts, which were abolished by Sections 289 and 291 of the Judicial Code and their powers transferred to the District Courts.

Ex parte United States, 226 U. S. 420.
Nashville Interurban Ry. v. Bacauus, 212 Fed. Rep. 634.

Prior to 1912 a jury could not be waived in an action at law in the District Courts and a decision of such a cause tried without a jury was not reviewable in any event.

Campbell v. United States, 224 U. S. 99, 105.
Doty v. Jewett, 19 Fed. Rep. 337, 338.
Eastern Oil Co. v. Holcomb, 212 Fed. Rep. 126.

Under these provisions it has been the long established rule that whenever cases are submitted for trial without a jury, and a stipulation in writing waiving a jury has not been filed with the clerk, as provided in Section 649, the trial, if before a court or before a referee, virtually constitutes an arbitration, and a judge or referee who acts in the absence of such written waiver acts solely as an arbitrator. There is, therefore, nothing here for review.

Campbell v. Boyreau, 21 How. 223.
Flanders v. Tweed, 9 Wall. 425.
Kearney v. Case, 12 Wall. 275.
Swift v. Jones, 145 Fed. Rep. 489.
Ford v. U. S., 200 Fed. Rep. 657.
Dundee Mortgage Co. v. Hughes, 124 U. S. 137.
Roberts v. Benjamin, 124 U. S. 64.
Shipman v. Mining Co., 158 U. S. 361.
Dingman v. United States, 274 U. S. 195.

Fleischmann v. United States, 270 U. S. 349, 355.
Thompson-Starrett Co. v. La Belle Iron Works, 17 Fed. (2nd) 635; certiorari denied, 274 U. S. 748.

In *Duignan v. United States*, 274 U. S. 195, the most recent of these decisions, Mr. Justice Stone clearly stated the rule regarding the waiver of a jury trial:

> "The right to a jury trial may be waived where there is an appearance and participation in the trial without demanding a jury. (*Kearney v. Case*, 12 Wall. 275; *Percgo v. Dodge*, 163 U. S. 160, 166). Section 649 of the Revised Statutes provides that issues of fact may be tried by a court without a jury, *upon written stipulation of the parties*, and that the finding of the court upon the facts shall have the same effect as the verdict of the jury. But this section does not preclude other kinds of waiver (*Kearney v. Case, supra*). *Its purpose and effect, when read together with Sections 648 and 700, is to define the scope of appellate review in actions at law without a jury. Unless there is a written stipulation waiving a jury, there can be no review of the rulings on questions of law in the course of the trial or of the sufficiency of a special finding to support the judgment.* **See** *Law v. United States*, 266 U. S. 494, 496; *Cf. Fleischmann Co. v. United States*, 270 U. S. 349, 355, 356."

Even where a trial by jury *has been waived in writing* the appellate court is limited to the sufficiency of the facts found to support the judgment and to rulings excepted to and presented by a bill of exceptions.

Llewellyn v. Electric Reduction Co., 48 Sup. Ct. Rep. 63.
Ingram Day Lumber Co v. Melouth, 48 Sup. Ct. Rep. 153, 154.

In the present case there was neither a written waiver of trial by jury nor a bill of exceptions and the case comes within the rule laid down in *Duignan v. United States* (*supra*).

(2) *An oral waiver of trial by jury does not satisfy the statute. Nothing but a stipulation in writing waiving a jury will suffice.*

Madison County v. Warren, 106 U. S. 622.
Andes v. Slawson, 130 U. S. 435.
Rush v. Newman, 58 Fed. Rep. 158.
Illinois Surety Co. v. United States, 229 Fed. Rep. 327.
William Edwards Co. v. La Due, 230 Fed. Rep. 378.

II.

The petitioners' contention that the contract between them and the respondent's assignor was illegal and violative of public policy is without justification.

(1) In *Steele v. Drummond*, 48 Sup. Ct. Rep. 53, decided November 21, 1927, the principles applicable to the defense that a contract is void as being contrary to public policy were carefully formulated. There it was claimed that a contract for the extension of a railroad was illegal as opposed to public policy because one of the parties agreed to procure the passage of ordinances in a town through which the railway was to run.

It was held: (a) It is only because of the dominant public interest that one who has had the benefit of performance by the other party is permitted to avoid his own obligation on plea that the agreement is illegal. (b) As re-

spects the enforceability of a contract claimed to violate public policy it is a matter of great public concern that freedom of contract be not lightly interfered with. (c) It is only in clear cases that contracts will be held void as against public policy, since the principle must be cautiously applied to guard against confusion and injustice. (d) Detriment to public interest will not be presumed in a contract where nothing sinister or improper is done or contemplated.

In this connection it is proper to note, by way of contrast, the statement in the petition herein (*Petition*, p. 19; *Petitioners' Brief*, p. 4):

> "It is immaterial that the particular contract in controversy, as, for example, that here, is not tainted with a perverted motive."

The decision in *Steele* v. *Drummond* is in line with overwhelming authority which imposes the burden of proof to show that an agreement is illegal or against public policy on the party urging the contention, and applies the principle *ut res magis valeat quam pereat*.

Baltimore & Ohio Ry. Co. v. *Voigt*, 176 U. S. 498, 505.

Valdes v. *Larrinaga*, 233 U. S. 705, 709.

Canal Co. v. *Hill*, 15 Wall. 94.

Hobbs v. *McLean*, 117 U. S. 567.

Oregon R. R. & Nav. Co. v. *Dumas*, 181 Fed. Rep. 781.

Dykers v. *Townsend*, 24 N. Y. 57.

Curtis v. *Gokey*, 68 N. Y. 300.

Ormes v. *Dauchy*, 82 N. Y. 443.

Izvillard v. *Clyde*, 86 N. Y. 384, 387.

Cheesbrough v. *Conover*, 140 N. Y. 382.

Shedlinsky v. *Budweiser Brewing Co.*, 163 N. Y. 439.

Richards v. *Wiener Co.*, 207 N. Y. 59.
People ex rel. N. Y. C. & H. R. R. R. Co. v. *Walsh*, 211 N. Y. 90.

(2) Not only have the petitioners failed to prove an invalid agreement as the basis of this action, but the findings of the Referee show unmistakably that there was no taint of illegality in the arrangement between the parties.

The facts as found show that neither of the parties in their relations, contemplated or actual, was moved by any other idea than that of subserving the interests of the creditors of Thompson. Mr. Untermyer was concerned solely with the welfare of the unsecured creditors. He had been the counsel for a creditors' committee, created eighteen months before the institution of the bankruptcy proceedings, which represented 95 per cent. of all of the unsecured creditors of Thompson and $14,000,000 of claims out of a total of $15,000,000 of unsecured indebtedness. A receiver had been appointed by the Court of Common Pleas of Pennsylvania in an attempt to conserve the assets of Thompson for the benefit of his creditors. The Supreme Court of Pennsylvania having, however, in 1917, decided in *Hodgsett* v. *Thompson*, 258 Pa. St. 85, that under the chancery practice of that State there was no authority for such a receivership, it thereupon became apparent that, in order to prevent the property from being sacrificed and absorbed by the secured creditors, the only hope of protecting the unsecured creditors was by instituting bankruptcy proceedings. Acting, therefore, solely in the interest of these creditors and for the purpose of conserving the assets, Mr. Untermyer whose relations with the petitioners were most cordial, brought these facts to the attention of Mr. Weil and requested him to institute bankruptcy proceedings in the interest of the creditors and to prevent the property of the bankrupt from being dissipated and frittered away, as it would otherwise have

been. He indicated what he regarded to be the limit of compensation which the respondents ought to receive for the services which were then in contemplation. Mr. Weil recognized the fact that this business came to him through Mr. Untermyer and that 95 per cent. of the unsecured creditors of Thompson were represented by the committee for which Mr. Untermyer was counsel. He expressed his readiness to accept for his services in the proceedings which were to be instituted whatever sum Mr. Untermyer would regard as proper. That was fixed at $5,000.

Mr. Weil represented no creditors; his services were not essential to the carrying out of the plan of the creditors' committee. Mr. Untermyer himself might have instituted the bankruptcy proceedings. It was, however, regarded as convenient to have local counsel. It was understood that Mr. Untermyer would collaborate with Mr. Weil, because of the fact that 95 per cent. of the unsecured creditors were represented by him, and that he would studiously follow the proceedings and advise Mr. Weil with regard to them solely in the interest of all the creditors in whose protection he was deeply concerned.

That the trustees were chosen and that Mr. Weil was made one of their counsel, without any action on the part of Mr. Untermyer, negatives the idea of an illegal contract. The Referee expressly found that the affairs of the Thompson estate were very complicated and that Mr. Untermyer was the person most conversant with them from the legal aspect (*Rec., fol.* 7217). It was further found that the trustees in bankruptcy in selecting the petitioners as their counsel, realized that they were selecting for that position counsel of the committee of creditors, which was represented by Mr. Untermyer, and knew of the petitioners' connection with him in relation to such creditors (*Rec., fol.* 7217).

It became evident in the course of the administration of the estate of Thompson that, on account of the com-

plications which had arisen, the period of the administration would be prolonged beyond that contemplated at the time of the institution of the bankruptcy proceedings, and that this rendered it necessary for the petitioners and Mr. Untermyer and the firm of Guggenheimer, Untermyer & Marshall, who acted for the latter, to perform services which exceeded those originally contemplated (*Rec., fol.* 7218).

In recognition of that fact, Mr. Untermyer and the petitioners agreed that they would collaborate by rendering such services as were necessary and proper in the bankruptcy proceedings for the conservation of the estate and the protection of the creditors of the bankrupt. It was further agreed that the petitioners were to receive for the services so to be rendered by them, out of such allowances as should eventually be made by the Court in payment therefor, such sum as Mr. Untermyer should consider just and equitable, the remainder of the amount so allowed being retained by the petitioners (*Rec., fols.* 7219, 7220).

It is not pretended that the expense to the estate was in any way to be increased or that it was enhanced to the extent of a penny by reason of such arrangement. Whatever compensation the petitioners were to receive was to be for the services actually rendered for the benefit of the estate, and such allowances were made by the Court to the amount of $142,659.98, the Referee finding that "a substantial part of the services for which these allowances were made had been performed by Mr. Untermyer and by Guggenheimer, Untermyer & Marshall acting for him" (*Rec., fol.* 7222).

The Referee further found that the petitioners continued to render services in the bankruptcy proceedings under the general supervision and with the active aid, assistance and collaboration of Mr. Untermyer and of Guggenheimer,

Untermyer & Marshall, who acted for him, which resulted in the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor by the trustees in bankruptcy upon the sale of such assets, from which the allowances in question were made (*Rec., fols.* 7221, 7222).

Surely these undisputed facts indicate that "nothing sinister or improper was done or contemplated." The services rendered inured to the benefit of the bankrupt's estate and of his creditors. The co-operation of Mr. Untermyer and of those who acted for him assured the creditors of the benefit of the services of those most conversant with the complicated affairs of the Thompson estate from the legal aspect. There was no secrecy as to this collaboration. The allowances made to the petitioners represented not only their own services, but those of Mr. Untermyer and his associates. It was a unitary service and the compensation allowed was for that service. There was nothing improper on the part of the petitioners, who recognized the value of these services, under the circumstances, to authorize Mr. Untermyer to determine how the amount received should be distributed between those who had rendered the services for which the allowances were made. There was nothing malign in the fact that those who were seeking to conserve the assets of the bankrupt and who represented no interest hostile to that of the general creditors, but were directly concerned in the welfare of 95 per cent. of those creditors, should, to speak colloquially, keep their eye upon the bankruptcy proceedings and render active aid, assistance and collaboration to the petitioners in the effort to conserve the assets for the benefit of the creditors—*a result accomplished by their united efforts.* It is not pretended that anything was done or undertaken to be done which interfered or tended to interfere with the authority of the Court or the action of the trustees. It

is not pretended that either they or any of the creditors made the slightest objection.

Petitioners rely on *Maxsell v. Maiers*, 203 App. Div. 646, aff'd 236 N. Y. 516. An analysis of that decision demonstrates that there is nothing in common between its facts and those now under consideration.

There an involuntary petition in bankruptcy was filed against the Franklin Brewing Company about January 23, 1917. Prior to that date the plaintiff was its attorney, familiar with its affairs and the names of all of its creditors. The complaint alleged:

> "*That thereafter the defendant herein requested plaintiff to assist him in electing and having appointed certain trustees of the said bankrupt corporation, and to thereafter aid in procuring the appointment of the defendant as attorney for said trustees* and to assist the said defendant in the event of his appointment as attorney for said trustees in all matters of litigation which he might be called upon to do by the said *defendant, and said defendant agreed with plaintiff herein that in the event of such appointment as aforesaid as attorney for the said trustees*, that he would pay to the plaintiff herein one third of any and all fees and allowances that might be awarded to and received by him for his services as attorney for the said trustees."

It was further alleged that thereafter "the plaintiff herein used his efforts and assisted in procuring the election and appointment" of certain designated trustees, one of whom was the defendant's son, and that plaintiff urged upon such trustees the appointment of the defendant as their attorney, and that thereafter the defendant was duly elected and appointed attorney for the trustees.

Commenting on these facts, Mr. Justice Young said:

> "Clearly, the purpose of the agreement was to procure the election of certain trustees, *whose primary and controlling qualification was that, when elected, they would appoint defendant their attorney to conduct the litigation of the estate.* * * * The agreement in question, if at all effectual, tested the fitness of the trustees, whose election was to be procured, *not by their qualifications as being men of intelligence, honesty and integrity, who would act solely in the interests of the creditors by whom they were elected, but the paramount and controlling consideration was that such trustees, and only such, would be elected, who would appoint the defendant their attorney. Otherwise, the agreement was meaningless. Plaintiff's compensation for the services to be rendered depended upon the accomplishment of that result. In other words, in order to earn such compensation, he must obtain two things: (1) election of trustees who would appoint defendant their attorney; (2) defendant's appointment by them as such attorney. That was the essence of the contract, and, so far as its real purpose was concerned, nothing else was of the slightest importance.* Persons illiterate, dishonest, open to sinister influences or otherwise, might be elected pursuant to the agreement sued on, and if they fulfilled the requirements of that agreement by appointing defendant their attorney, plaintiff's compensation was earned, or at least the contingency which stood in the way of his obtaining such compensation was removed."

Here, respondent's assignor was not requested to assist the petitioners in the election of trustees for Thompson, or to procure their appointment as attorneys of the trustees; nor was there any purpose or intent on his part to do aught that would interfere with the rights and interests of Thompson's creditors.

(3) Courts will not lightly condemn a contract as contrary to public policy. Such a defense is carefully scrutinized and can only be based on proof susceptible of no other than a malign interpretation.

Hyams v. *Stuart King* (1908), K. B. Div. 696, 710.

Lord Halsbury in *Janson* v. *Driefontain Consolidated Mines, Ltd.*, 1902 App. Cas. 491.

Baron Parke in *Egerton* v. *Lord Brownlow*, 4 H. L. Cas. 123.

(4) There was nothing illegal in the agreement between the respondent's assignor and the petitioners, whereby it was left to his determination as to how the compensation allowed by the Court, for the services rendered, was to be divided.

Well, as the appointee of the trustees, represented the creditors of the bankrupt, the trustees themselves acting for the creditors, for whose benefit the proceedings had been instituted.

In re Gordon Supply & Mfg. Co., 129 Fed. Rep. 622.

In re Hanson, 156 Fed. Rep. 717.

It goes without saying that a trustee in bankruptcy has the right to employ counsel where legal advice is necessary for the performance of his duties.

In re Stotts, 93 Fed. Rep. 438.

In re Abram, 103 Fed. Rep. 272.

In re Baber, 119 Fed. Rep. 520.

In re Champion Wagon Co., 193 Fed. Rep. 1004.

1 *Remington on Bankruptcy* (2nd Ed.), pp. 714-721.

Indeed, it has been held to be error for a referee in bankruptcy to permit the creditors by a majority vote to select the attorney for the trustee, the right to make such selection being in him, subject only to control by the Court.

In re Columbia Iron Works, 142 Fed. Rep. 234.

The relations between trustee and counsel are merely those of client and attorney.

In re Abram, 103 Fed. Rep. 273.

There is no statutory restriction upon the power of the trustees to employ counsel, the generally accepted doctrine being, however, that the trustee shall not as a rule employ as counsel those who have represented or are representing adverse interests, as, for example, the bankrupt or his family.

The general rule with respect to the payment of fees to the attorneys for the trustee was laid down in *In re Byerly*, 128 Fed. Rep. 637, where it was said:

> "There is no direct provision in the Bankruptcy Act for the payment of the fees of attorneys employed by the trustee, but they come in as part of the administration of the estate like other necessary expenses."

To the same effect, see:

Page v. Rogers, 149 Fed. Rep. 194; 211 U. S. 575, 581.

In re Smith, 203 Fed. Rep. 369.

In the absence of any finding showing adverseness of interest, it will not be presumed that the interests of part of the unsecured creditors are adverse to the other unsecured creditors.

In this connection, attention is directed to the 9th finding contained in the Referee's report (Rec., fol. 7217) and to the further fact that with this knowledge the allowances in question were made to the defendants.

The petitioners claim that Rule V of the Rules of the United States District Court for the Western District of Pennsylvania forbade the arrangement made between the petitioners and respondent's assignor.

That rule, however, has no possible relation to the subject. It merely provides that unless specially authorized by the Court, receivers and trustees in bankruptcy shall not retain *as their attorney*, the attorney of the bankrupt, of the petitioning creditors, of the persons applying for the appointment of a receiver, or of any creditor, and that the trustees shall not retain *as their attorney*, any attorney who has obtained proxies or voted upon the election of such trustees, or who is an attorney for persons holding such proxies.

It is not claimed that the respondent's assignor was appointed or retained as attorney by the trustees, or that he obtained proxies or voted upon the election of the trustees, or that he was the attorney for persons holding such proxies. Mr. Weil was retained as attorney by the trustees and his designation was undoubtedly authorized by the Court, for it made allowances to him for the services rendered to the trustees in the bankrupt estate. There is not a word in the rule which in any way restricted him in the choice of those who might assist him professionally and in an advisory capacity in the performance of his duties. It would be farcical to say that he was bound to forego the collaboration of the person most conversant with the conditions affecting the rights and interests of the creditors, or to suppose for a moment that the trustees or the Court would ignore the advantages flowing from such co-operation and watchfulness.

The General Order in Bankruptcy, promulgated on April 13, 1925 (267 U. S. 614, 615), relating to the compensation of attorneys, receivers and trustees, was referred to by petitioners in the Court below. It is, of course, not retroactive. Nor has it any bearing here. It merely provided that *every attorney* seeking an allowance of compensation *from a bankrupt estate* for services rendered, shall file with the Referee a petition under oath, setting forth certain facts. The petition "is to be accompanied by an affidavit of the applicant, stating that no agreement had been made directly or indirectly and that no understanding exists for a division of fees *between the applicant and the receiver, the trustees, the bankrupt, or the attorney of any of them.*" In the absence of such petition and affidavit no allowance of compensation is to be made.

The respondent's assignor was not the receiver, or the trustee, or the attorney for the receiver or the trustee or the bankrupt. Consequently a transaction such as that now under review does not come within the scope of the General Order. It follows that there is nothing either in the Bankruptcy Act or in the General Orders to prevent an attorney for a trustee from making any disposition that he desires of his fees and to divide them with any person not expressly excluded.

That a division of fees between lawyers who collaborate in the rendition of service is lawful is expressly provided in subdivision 2 of Section 274 of the New York Penal Law, where, after forbidding certain acts by attorneys or counselors, out of abundance of caution it is declared:

> "But this subdivision does not apply to an agreement between attorneys and counsellors, or either to divide between themselves the compensation to be received."

Matter of Fitzsimmons, 174 N. Y. 15.
Scolaro v. *Ash*, 137 App. Div. 667.

It has likewise been held that the fact that one of the attorneys does substantially all the work will not entitle him to more than the agreed proportion where the other is ready and willing to serve whenever called upon.

Owen v. *Dudley*, 217 U. S. 488.

It is immaterial whether the client knew of the contract between the attorneys or not or whether he had any connection with it.

Acosk v. *Baker* (Tex.), 60 S. W. Rep. 273.

A general custom as to a division of fees between lawyers exists and has been enforced by the Courts.

Parker v. *Gartside*, 178 Ill. App. 634.
Ford v. *Freeman* (Cal.), 180 Pac. Rep. 545.
Gill v. *Mayne* (Iowa), 162 N. W. Rep. 24.
Underwood v. *Overstreet*, 223 S. W. Rep. 152.
Smith v. *Waldrop*, 77 So. Rep. 331.

See also:

Watkins v. *Sidberry*, 261 U. S. 571.
Candler v. *Candler*, Jacobs, 225.
Brown v. *Guy*, 4 East. 190.
White v. *Polhamus*, 1 N. Y. City Court 421.

III.

The contract sued upon is neither vague nor indefinite in its terms. It was left to Mr. Untermyer to determine how the fees allowed to the petitioners were to be divided. His determination that the respondent's assignor should have 40 per cent. and the petitioners 60 per cent. of these fees is controlling, there being no pretense of bad faith.

In *Goltra* v. *Weeks*, 271 U. S. 536, 547 549, the question related to the termination of a lease by the lessor, the chief of engineers, for non-compliance by the lessee with the terms of the contract. In the course of the opinion Mr. Chief Justice Taft said:

> "*Nor does the circumstance that, as in this case, the lessor whose judgment is to prevail is a party to the contract alter the legal result. Of course the Chief Engineer is not the real party in interest. He is a professional expert, as such was designated as lessor, and is really acting only as an agent for the Government. But even if this were a stipulation between private individuals, judgment of one of the parties on such an issue would be, in the absence of bad faith, conclusive. There are many cases where the contract makes the satisfaction of one of the parties in respect of compliance the condition precedent to fulfillment, and good faith is all that is required to justify rejection of work or product tendered.*"

The cases referred to in the foregoing quotation are those which have enforced provisions contained in contracts for the erection of a building or for the construction of a railroad to the effect that performance shall be to the satisfaction of the architect or engineer or of the person or corporation for whom the work is done. Likewise the

familiar decisions which leave it to the determination of one of the parties to a contract as to whether or not the work done by the other in alleged performance of it has been completed to his satisfaction.

Kihlberg v. *United States*, 97 U. S. 398.
Sweeney v. *United States*, 109 U. S. 618.
Chicago, S. F. & Cal. R. R. Co. v. *Price*, 138 U. S. 185.
Ripley v. *United States*, 223 U. S. 695.
Bush v. *Jones*, 144 Fed. Rep. 942, 947.
Cope v. *Beaumont*, 181 Fed. Rep. 19.
J. H. Sullivan Co. v. *Wingenroth*, 203 Fed. Rep. 160.
Robinson v. *United States*, 251 Fed. Rep. 461.
Thompson-Starrett Co. v. *La Belle Iron Works*, 17 Fed. (2nd) 536, 541; certiorari denied, 274 U. S. 748.
Payne v. *Roberts*, 214 Pa. St. 546.

This principle has been applied in a variety of cases.

In *Heyman Cohen & Sons, Inc.* v. *M. Lurie Woolen Co., Inc.*, 232 N. Y. 112, the defendant entered into a contract to furnish specified merchandise to plaintiff, which further provided that *plaintiff* is given the "privilege * * * to confirm more of the above if (the defendant) can get more." It was held that the implication was plain *that the buyer was to fix the quantity* subject only to the proviso that the quantity shall be limited by the ability to supply. *In that case the buyer was the plaintiff.* Yet it was held that he could determine the quantity of merchandise to be supplied.

In *Brown* v. *Bellows*, 4 Pickering 179, where a contract for the sale of real property provided that the parties should name appraisers who were to put a valuation upon

the property, the Court held that the contract was binding.

In *New England Trust Co.* v. *Abbott*, 162 Mass. 148, 38 N. E. 432, it was held that the contract between a stockholder and a corporation providing for the transfer of the stockholder's stock to the corporation *at a price to be fixed by the directors*, was valid. The Court said:

> "It is settled that one may agree to sell his property at a price to be determined by another, and that he will be bound by the price so fixed, *even though the party establishing it was interested;* provided the interest was known, and no objection made by the parties, and no fraud or bad faith is shown."

See also:

Matter of Fletcher, 237 N. Y. 440.

Nor is there legal objection to a contract whereby it is left to the determination of one of the parties as to how a certain fund is to be divided. There the parties have provided a method whereby that which might otherwise be indefinite and uncertain is made definite and certain.

Jones v. *Roberts*, 113 App. Div. 285, aff'd 189 N. Y. 497.

Attention is directed to the following contracts which were held to be sufficiently definite:

A contract to purchase what the buyer required in his business.

Church v. *Proctor*, 66 Fed. Rep. 240.

A contract to purchase buyer's entire consumption of phosphate rock.

Loudenback Fertilizer Co. v. *Tennessee Phosphate Co.*, 121 Fed. Rep. 298.

A contract to buy all quebracho needed for the buyer's factory.

Klipstein v. *Allen*, 123 Fed. Rep. 992.

An agreement to take care of the buyer's needs for the year.

T. B. Walker Mfg. Co. v. *Swift*, 200 Fed. Rep. 529.

A contract to buy and sell buyer's "August requirements."

Jenkins v. *Anaheim Sugar Co.*, 247 Fed. Rep. 958.

A contract to buy all iron that the purchaser should use, need or consume in his business.

National Furnace Co. v. *Keystone Mfg. Co.*, 110 Ill. 427.

A contract to purchase buyer's requirements of coal.

Minnesota Lumber Co. v. *Whitebreast Coal Co.*, 160 Ill. 85.

A contract to give buyer's trade.

Warden Coal Washing Co. v. *Meyer*, 98 Ill. App. 640.

A contract to buy all ice which the plaintiff required for his hotel.

Smith v. *Morse*, 20 La. Ann. 220.

A contract to buy all ice which the seller might desire to sell.

Burgess Fibre Co. v. *Broomfield*, 180 Mass. 283.

A contract to buy all wheels that the purchaser might "want" during the ensuing season.

Cooper v. *Lansing Wheel Co.*, 94 Mich. 272.

A contract to buy all ice necessary to carry on the buyer's business.

Hickey v. *O'Brien*, 123 Mich. 611.

A contract to buy all the cans which the purchaser should use in its factory.

Dailey Co. v. *Clark Can Co.*, 128 Mich. 591.

A contract for a shipper's insurance business for a season.

Ames-Brooks Co. v. *Aetna Ins. Co.*, 83 Minn. 346.

A contract to purchase the "necessary brick, lime and cement which I may require at my two jobs."

Miller v. *Leo*, 35 App. Div. 589, aff'd 165 N. Y. 619.

A contract by buyers for "their supply" of certain drugs.

Isahel Wheeler Co. v. *Mendelson*, 180 App. Div. 9.

It will be observed that in most of the cases enumerated it was left to the buyer who sought to enforce the contract

to determine what his needs were or how much of the merchandise he required during a stipulated period, and in all of these cases the contracts were held sufficiently definite to permit the person making the requisition to enforce his requirements.

The cases cited on behalf of the petitioners on this proposition have nothing in common with the facts of this case. In each of them the agreement sought to be enforced was palpably indefinite. There was nothing by which the compensation to be paid was determinable. Everything was left to the discretion of the defendant and he did not choose to make any determination as to the compensation to be paid. Here, however, Mr. Untermyer was to determine upon the terms of the division, and he made the determination. It was left to his judgment. The maxim *id certum est quod certum reddi potest* applies.

Barker v. *O'Grady*, 163 N. Y. Supp. 594, involved an oral contract with the defendant under which he agreed to make "an equitable division" with the plaintiff of fees received by him. The plaintiff sought a recovery in an action at law. The defendant had made no division and there was, therefore, nothing on which to base a recovery.

In *McDonald* v. *Acker, Merrill & Condit Co.*, 192 App. Div. 123, the defendant agreed to pay "a liberal and very substantial bonus in addition to a stated salary." Here, again, all depended upon the action of the defendant, and it did not act. Had the agreement been one to pay the plaintiff the amount which the plaintiff should determine to be fair and just a different result would have followed.

Canet v. *Smith*, 173 App. Div. 241, involved an agreement "to pay to the plaintiff a reasonable amount from the proceeds to be realized from the sale of merchandise

manufactured from (certain) secret processes. No method was provided for determining what was "a reasonable amount."

In *Featherstone* v. *Fowler*, 174 App. Div. 452, the defendant contracted to pay the plaintiff "for his time, his labor and his trouble." No method was provided in the contract for ascertaining the amount to be paid for the time, labor and trouble.

In *Bluemner* v. *Garvin*, 120 App. Div. 29, the defendant agreed that he "would fairly share with plaintiff the commissions received * * * on account of the contract with the City of New York." No method was provided whereby it was to be determined as to how the sharing would take place.

In *United Press* v. *New York Press Co.*, 164 N. Y. 406, the defendant agreed to pay plaintiff "a sum *not exceeding* $300 during each and every week that said news report is received" by the defendant. A sum not exceeding $300 might be nothing, or $1 or $5. Here, again, there was no method provided for determining the amount to be paid.

That this is the correct interpretation of the case just cited appears from the opinion of Mr. Justice Jenks in *Rosbach* v. *Sackett & Wilhelms Co.*, 134 App. Div. 130, where there was a contract of employment for a term of years at a salary "not less than $45 per week." That was held not to be indefinite.

In *Varney* v. *Ditmars*, 217 N. Y. 223, the agreement was: "If you boys will go on and continue the way you have been and get me out of this trouble and get the job started that were in the office three years, on the first of next January I will close my books and give you a fair share of my profits." Here, again, there was no method

provided whereby the share of profits to which the plaintiff was entitled was to be determined.

IV.

It is respectfully submitted that the petition for certiorari should be denied.

LOUIS MARSHALL,
Respondent's Counsel.